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No 81-132

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED ELECTRIC CORPORATION,
Petitioner,

VS.

THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Claims

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Claims, for lack of jurisdiction, dismissed a petition which alleged that (1) plaintiff was a supplier of material to a prime contractor on a federal public works project, (2) defendant is the owner of the project and enjoys the use of plaintiff's material, (3) the prime contractor did not pay for the material, (4) defendant failed to comply with the Miller Act in that it did not require a payment bond to protect plaintiff in the event the prime contractor did not pay, (5) defendant wrongfully disbursed progress payments to the prime contractor, and (6) defendant retains funds owing on the contract that should be applied to plaintiff's claim.

Under these circumstances, does plaintiff have a remedy in the Court of Claims?

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UNITED ELECTRIC CORPORATION,
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PETITION FOR WRIT OF CERTIORARI

Petitioner, United Electric Corporation, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Claims dismissing petitioner's claims.

CITATIONS TO OPINION BELOW

The opinion of the Court of Claims, printed in Appendix A hereto, is (or will be) reported in 227 Ct.Cl. ....., 647 F.2d 1082.

JURISDICTION

The judgment of the Court of Claims was entered on April 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATUTES INVOLVED

The substantive statutory provisions involved are commonly known as the Miller Act, 40 U.S.C. §§ 270a-270b, reproduced in Appendix B hereto. The procedural statute involved is the Tucker Act, 28 U.S.C. § 1491, reproduced in Appendix C hereto.

STATEMENT OF CASE

Petitioner brought this action in the Court of Claims on January 7, 1980, to assert recognized equitable lien rights against contract retentions held by defendant on a federal public works project.

United Electric alleged that it supplied electrical components used in the construction of a materials handling facility at McClellan Air Force Base in Sacramento, California. The Air Force failed to require from the prime contractor the payment bond mandated by the Miller Act. Further, it wrongfully disbursed progress payments and failed to determine that those payments were being diverted from payments due to suppliers under the subject contract. Since the prime contractor is unable to pay the agreed contract price, United Electric remains uncompensated for $107,958.42 worth of materials that have benefited the United States under the construction contract; this even though the United States holds more than $550,000 in contract retentions otherwise due the prime contractor.

On defendant's motion to dismiss for lack of jurisdiction, filed March 5, 1980, the Court of Claims dismissed the action on April 22, 1981. Thus, the case must be de-

cided on the facts alleged in United Electric's petition, a copy of which is reproduced as Appendix D hereto.

REASONS FOR GRANTING THE WRIT

United Electric has suffered damages in excess of $107,000 because the Air Force failed to comply with its statutory duty to assure that "[b]efore any contract . . . for the construction, alteration, or repair of any public . . . work of the United States is awarded to any person, such person shall furnish to the United States . . . (2) A payment bond . . . for the protection of all persons supplying labor and material in the prosecution of the work . . ." 40 U.S.C. § 270a. Further, the Air Force failed to comply with its regulatory obligations by disbursing progress payments exceeding percentages of completion by the prime contractor and failing to determine that the progress payments were being diverted from payment of claims against the project. 41 C.F.R. § 1-30.521. Since the Air Force holds over $550,000 in contract retentions, and the prime contractor is bankrupt and unable to pay, United Electric seeks equitable relief from the United States. The Court of Claims, reluctantly, decided that United Electric has rights but no remedy.

Under virtually identical facts, the Tenth Circuit has held that a supplier such as United Electric is entitled to payment from the contract retentions, and, to the extent the amount retained is insufficient, for amounts wrongfully disbursed. *Kennedy Electric Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir., 1974). The *Kennedy* decision interprets a line of cases decided by this Court.

In this case, the Court of Claims, expressing its uneasiness with the result, was compelled by its earlier decision in *United States Fidelity & Guaranty Co. v. United States,* 201 Ct.Cl. 1, 475 F.2d 1377 (1973), to dismiss United Electric's petition. The Court refused to follow *Kennedy* for one crucial reason: there the case was against the United States Postal Service, not the United States. It concluded that Congress did not give it jurisdiction in 28 U.S.C. § 1491 to entertain actions such as this against the Government.

The different decisions of the Court of Claims below and in *USF&G,* and of the Tenth Circuit in *Kennedy,* spring from inconsistent interpretations of decisions of this Court, including some possibly contradictory statements in *United States v. Munsey Trust Co.,* 332 U.S. 234, 91 L.Ed. 2022, 67 S.Ct. 1599 (1947), and *Pearlman v. Reliance Insurance Co.,* 371 U.S. 132, 9 L.Ed.2d 190, 83 S.Ct. 232 (1962).

It is necessary that this Court resolve the conflicting decisions of the Court of Claims and of the Tenth Circuit concerning the important and recurrent question of equitable rights of unpaid suppliers of labor and material used in the construction of federal public works projects.

A. Analysis of Kennedy Electric Co.

In *Kennedy,* a public works contract was made without the required Miller Act payment bond. There also, as alleged here, the Government failed to properly monitor and supervise the financial aspects of the project and made improper progress payments to the prime contractor. Subsequently, the prime contractor became insolvent and the

subcontractor asserted an equitable lien against the retention and against improper progress payments. The district court found in favor of the subcontractor in all respects, upheld its equitable liens on the retention and the improper progress payments, and entered judgment in favor of the subcontractor for the balance unpaid on its subcontract, plus interest. On appeal, the Tenth Circuit rejected the argument of sovereign immunity (508 F.2d at 957), as well as defendant's reliance on the Court of Claims decision in *USF&G,* and affirmed, reasoning as follows:

> "The Miller Act, 40 U.S.C.A. § 270a, was intended to provide a remedy for suppliers of labor and material to a federal project. These suppliers to not have their usual security interest because a lien cannot attach to federal property. Miller Act protection goes to those who have a contractual agreement with a prime contractor or a subcontractor. *F. D. Rich Co., Inc. v. United States,* 417 U.S. 116, 122, 94 S.Ct. 2157, 40 L.Ed.2d 703. Kennedy was within the protected class but, because of Department's failure to comply with the statute, the contractor did not furnish a payment bond. There is no surety from which Kennedy may recover." (508 F.2d at 957.)

The Court then traced the long standing recognition of a subcontractor's equitable lien on the retention, citing *Prairie State National Bank v. United States,* 164 U.S. 227, 41 L.Ed. 412, 17 S.Ct. 142 (1896), upholding the priority of a surety which had completed a construction contract after default over the priority of an assignee of the prime contractor. Cited also was *Henningsen v. United States Fidelity & Guaranty Co.,* 208 U.S. 404, 52 L.Ed. 547, 28 S.Ct. 389 (1908), where a surety under the Heard

Act (28 Stat. 278) was required to pay claims for labor and materials on a federal project, and successfully sued to enjoin the government disbursing officer from paying the contract funds to a bank to which the prime contractor had assigned its interest in the retention. This Court held that the equities favored the surety rather than the assignee because the surety had paid the laborers and materialmen and thereby "released the government from all equitable obligations to see that the laborers and supplymen were paid." (208 U.S. at 410.)

In *United States v. Munsey Trust Co., supra,* a Miller Act surety paid the suppliers of labor and materials to the contractor and asserted a claim against the retention. The government asserted a right of setoff that was allowed by this Court. As discussed in *Kennedy* (508 F.2d at 958):

> "The Court said that laborers and materialmen do not have enforceable rights against the government for their compensation, 332 U.S. at 241, 67 S.Ct. 1599, that as a substitute for their customary lien protection the Miller Act requires a payment bond, Ibid., and that 'one cannot acquire by subrogation what another whose rights he claims did not have,' Ibid. at 242, 67 S.Ct. at 1603. Service reads Munsey as holding that laborers and materialmen have no enforceable right against the United States for their compensation and, hence, is dispositive of the case at bar. Kennedy counters with the statement in the opinion, 332 U.S. 242, 67 S.Ct. 1603:
>
> > 'We need not decide whether laborers and materialmen would have any claim to the retained percentages, if both contractor and surety failed to pay them.'

> The basic premise of Munsey is that the laborers and materialmen are protected by the statutorily required payment bond, 332 U.S. at 243-244, 67 S.Ct. 1599. That premise is absent from the case at bar. Department, in violation of the Miller Act, made the contract without requiring the bond. Munsey says nothing about the equitable considerations discussed in Prairie State Bank and Henningsen."

The Tenth Circuit in *Kennedy* also discussed disputes over contract retentions between the bankruptcy trustee of the prime contractor and the payment bond surety, citing *Pearlman v. Reliance Insurance Co., supra,* as follows (508 F.2d at 959):

> "The Court held that '*Munsey* left the rule in *Prairie Bank* and *Henningsen* undisturbed.' 371 U.S. at 141, 83 S.Ct. at 237, and said, Ibid.:
>
> > 'We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained funds to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; . . . and that the surety, having paid the laborers and materialmen, is entitled to the benefits of all these rights to the extent necessary to reimburse it.' "

Having thus discussed the pertinent opinions of this Court, the Tenth Circuit in *Kennedy* focused on and rejected the Government's reliance on the Court of Claims decision in *USF&G.* The decision did not turn on the difference in identity of the defendants—the Postal Service and the United States.

In *USF&G* the Miller Act surety had paid its obligations in full, then joined subcontractors who had not been fully

paid as plaintiffs, and asserted rights against the retention and improper progress payments. The Government claimed the retention pursuant to a tax lien. The Court of Claims held against the surety because it could not recover on the basis of amounts owed but unpaid to subcontractors. Relying on the statement in *Munsey* that laborers and materialmen do not have enforceable rights against the United States for their compensation, the Court held unpaid subcontractors had no standing to sue the United States. Nonetheless, the case does recognize that unpaid subcontractors have a valid equitable claim.[1]

More than the factual distinctions, the court in *Kennedy* was not convinced by the Court of Claims' reconciliation of *Munsey* and *Pearlman*. 508 F.2d at 959. In *Munsey* this Court expressly reserved decision on whether subcontractors have a right to retentions if both the contractor and surety fail to pay. 332 U.S. at 242, 91 L.Ed. 2029, 67 S.Ct. 1599. *Pearlman* notes that *Munsey* held only that the government could exercise its right of setoff. 371 U.S. at 140, 9 L.Ed.2d 196, 83 S.Ct. 232.

United Electric alleges here, as in *Kennedy*, a claim against the retention when neither the prime contractor nor a surety has paid, where the Air Force has the benefit of over $100,000 worth of services and materials furnished by

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[1] "Clearly, they are entitled to this fund on the equities. . . ." 475 F.2d at 1381.

"[T]he Court has recognized that the Government does owe the subcontractors an equitable obligation to see that they are paid. . . ." 475 F.2d at 1381.

United Electric, where the Air Force approved improper progress payments, and where the Air Force also has over $550,000 in undisbursed contract funds. There is no difference between the equities of the sureties, recognized in *Prairie Bank* and *Henningsen*, and the equities of the material supplier here.

B. The Claim is Founded Upon an Act of Congress

The Court of Claims did not consider the allegation of United Electric that its claim, in part, is based on the Miller Act. (Appendix D, Petition, ¶ 13.) Under 28 U.S.C. § 1491, that Court has "jurisdiction to render judgment upon any claim against the United States founded upon . . . any Act of Congress . . ."

While the Miller Act does not itself provide for payment of compensation by the United States when it violates the law (the Act assumes the government will comply with its obligation to require a payment bond), United Electric's claim is founded upon an Act of Congress. Indeed, a claim based on the government's failure to require a Miller Act payment bond depends entirely upon the federal statute. *United States v. Smith*, 324 F.2d 622, 625 (5th Cir. 1963), holding that an action for failing to require the bond cannot be prosecuted against the Government under the Federal Tort Claims Act.

The Miller Act protects subcontractors working on federal projects and protects the United States from suits rested upon its duty to insure that subcontractors receive

payment. *U.S., etc., Mississippi Road Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 265 (5th Cir. 1976). Congress provided compensation to unpaid subcontractors by direct action against the surety. 40 U.S.C. § 270b. But for the violation of the Miller Act by the United States, United Electric would be a direct beneficiary of the payment bond.

The unpaid subcontractor has a recognized equitable right to receive payment from contract funds retained or improperly disbursed by the Government. To deny United Electric an opportunity to pursue that right, founded on the violation of the Miller Act, is to forbid compensation to it for its materials being used by the Government. The Government may thereby disregard the Miller Act with impunity. Moreover, the Government escapes all responsibility for making unauthorized and irresponsible payments to its prime contractor that should have gone to United Electric.

C. The Claim is Founded on Contract

United Electric also claims relief under 28 U.S.C. § 1491 upon an "express or implied contract with the United States . . ." The Court of Claims in this case and in *USF&G* recognizes the substantive right to relief but concludes[2] that claimants such as this one are barred from any remedy because they have no direct contractual relationship with the Government.

The Court below, in analyzing the decisions of this Court in *Munsey* and *Pearlman*, concluded that the surety is sub-

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[2]". . . it is not a happy result . . ." (Appendix A, Opinion, p. 9.)

rogated both to the subcontractors whose claims it pays, as well as to the prime contractor, whose debts it pays when it honors its obligations under the payment bond. The surety can therefore use the subcontractors' claims to sue the Government. By this reasoning, the subcontractors, such as United Electric, have rights which they cannot enforce; only the surety if it pays the subcontractors, or the prime contractor if it pays them, has standing to enforce those claims against the Government.

But why should not the subcontractor, who performs the obligations of the prime contractor to the United States, have the same right of subrogation that the surety has when the surety satisfies the obligations of the prime contractor to the United States? United Electric, when it supplied its material to the prime contractor, performed the obligations of the latter to the Government. This is no different than the position of a surety (if there had been one) that paid the claim of United Electric.

Where the plaintiff seeks a monetary remedy, it is settled that the Court of Claims may employ equitable doctrines either as substantive principles on which to base the award, or as an equitable procedure to arrive at a money judgment. *Pauley Petroleum, Inc. v. United States,* 591 F.2d 1308, 1315 (Ct.Cl. 1979). Since United Electric seeks monetary relief, the equitable principle of subrogation should be utilized to provide that relief; United Electric should be considered by a court of equity as subrogated to all the rights the surety would ordinarily have. See *Philadelphia Nat. Bank v. McKinlay,* 72 F.2d 89, 91 (D.C. Cir. 1934).

Another approach, reaching the same result, is under a third party beneficiary theory. Even in instances where the plaintiff has done nothing to benefit the United States, and has no direct contractual relationship or privity with the United States, it is settled that an intended third party beneficiary of a government contract may sue under 28 U.S.C. § 1491. *Hebah v. United States*, 428 F.2d 1334, 1339 (Ct.Cl. 1970). The United States is an intended third party beneficiary of the subcontract between United Electric and the prime contractor, whereby United Electric performed a portion of the prime contract for the benefit of the United States. Thus there is an implied in fact contractual relationship between United Electric and the United States within the ambit of 28 U.S.C. § 1491.

As stated simply in *Compania General De Seguros, S.A. v. First Nat. City Bank*, 306 F.Supp. 1361 (D.Canal Zone 1969), holding in favor of a surety which had paid laborers and materialmen:

> "The United States is under an equitable obligation to see that laborers and materialmen are paid. . . . Laborers and materialmen have the equitable right to assert a claim to monies in the hands of the United States which are appropriated for the contract."

If the decision below stands there is no remedy for the Government's failure to comply with the Miller Act, or for its permitting the diversion of project payments, to the damage of contractors such as United Electric. That should not be the law and, according to *Kennedy*, it is not the law.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: July 15, 1981.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States Court of Claims

No. 10-80C

(Decided April 22, 1981)

UNITED ELECTRIC CORPORATION
v. THE UNITED STATES

John F. Taylor, attorney of record, for plaintiff.
John Charles Ranney, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant.

Before DAVIS, NICHOLS and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS

DAVIS, *Judge*, delivered the opinion of the court:

We are faced, once again, with the uneasy problem of whether a subcontractor has standing to sue the United States for compensation due it under a subcontract with a government contractor where both the prime and the surety have failed or refused to make the payment, and the Government retains funds owing on the contract. This time the question arises on the following claim (as asserted in the petition): In 1978, plaintiff United Electric Corporation (United) made a contract with Standard Conveyor Co. (Standard) to supply over $100,000 worth of electrical components which were to become part of a mechanized materials-

handling system that Standard contracted with the United States Air Force to fabricate, test and install at McClellan Air Force Base. The Air Force required Standard to post a payment bond of $494,665.50 under the Miller Act, 40 U.S.C. § 270a, an amount which United alleges was legally inadequate. Plaintiff says it performed its contractual obligations but did not receive payment from Standard which had filed a petition in bankruptcy in 1979, and is allegedly unable to pay. United then attempted to recover its compensation from Standard's surety, but the surety also refused compensation on the ground that the bond did not cover the materials provided by plaintiff.[1] However, plaintiff alleges the Government still retains a percentage of the contract in an amount ($550,000) much greater than United's demand ($107,958.42).

Plaintiff seeks judgment in this court from the United States for its contract price, asserting that the Air Force acted negligently and failed to comply with the requirements of the Miller Act, thus creating an equitable lien in United's favor on contract retainages (or other funds which should have been but were not retained by defendant). Defendant has moved to dismiss the petition, saying that the subcontractor has no claim within this court's jurisdiction.

The obvious difficulty for plaintiff is that the full court has already decided, in a comparable context, that we cannot entertain a subcontractor's claim which the prime (or a higher sub) and the surety have not paid. *United States Fidelity & Guarantee Co. v. United States*, 201 Ct. Cl. 1, 475 F.2d 1377 (1973) *(USF&G)*. There, the Miller Act surety had fully met its obligations under the payment and performance bonds, but certain laborers and materialmen remained unpaid. The surety and the unpaid subcontractors sued here, raising claims against contract retainages in the hands of the Government, and also alleging improper progress payments. The Government claimed priority to the retained funds on the basis of a tax lien and other unmet obligations owing to it by the prime contractor. After satisfaction of these debts, approximately $4,000 in unexpended contract funds remained—an amount far smaller than that still owed to the

[1] While the surety has refused to make payment, it has not yet been judicially determined that the surety is free from liability to United. Plaintiff has filed suit against the surety which is now pending in U.S. District Court.

subcontractors. On these facts we held that (1) the surety did not have priority against the United States for amounts necessary to satisfy tax and other obligations running from the prime to the Government; (2) the surety could not share in unexpended sums retained under the contract because it had not fully paid all of the laborers and materialmen (although it had completely satisfied its payment bond obligation to them); and (3) the subcontractors did not have standing to sue the United States on their own behalf.

The *USF&G* issue which is now critical concerns the last of these holdings—the right of subcontractors to sue the United States directly for their compensation. Relying on precedent from this court as well as the Supreme Court, we ruled specifically that such a right does not exist. This en banc holding is of course, binding on this panel.[2] But we can ask the full en banc court to reconsider that decision if we now think it wrong or questionable. We heard oral argument on the present case because a post-*USF&G* ruling of the Tenth Circuit could be thought to undermine our decision in *USF&G* (and is so presented by United). *Kennedy Electric Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974). Because of *Kennedy*, which United emphasizes strongly, we have reexamined the ground and now conclude that that case is quite distinguishable and that we have no reason to question *USF&G*.

In *Kennedy*, an electrical subcontractor which had performed work on a building for the Post Office Department (predecessor to the United States Postal Service) brought suit against the Postal Service for its compensation. That claimant had not been paid for its labor and materials because the prime had become insolvent and no Miller Act bonds had been posted. The Tenth Circuit, affirming a district court judgment in plaintiff's favor, held that the subcontractor had an equitable lien on contract retainages and amounts which had been improperly paid to the contractor's assignee in violation of Postal Service regulations.

Kennedy is quite different from both *USF&G* and the present case on a crucial point. In *Kennedy* the Postal Service, rather than the United States, was the defendant. The Postal Service is an independent establishment with the

[2] Plaintiff makes no attempt to distinguish *USF&G* and we discern no basis for doing so.

general capacity (given it by Congress) to "sue and be sued," *see* 39 U.S.C. § 401,[3] not a subordinate unit of the Federal Government like the Air Force. In *Kennedy*, therefore, there was no bar of sovereign immunity to the subcontractor's suit, and the Postal Service was found to be "just as amenable to the judicial process as is a private enterprise." *Id.* at 957, 960. *See also, F.H.A. v. Burr*, 309 U.S. 242, 245 (1940). Indeed, while discussing our decision in *USF&G*, the *Kennedy* court specifically stated:

> *USF&G* is a different case from that at bar. We do not have a standing question. Our suit is against an independent establishment having the power to sue and be sued. [508 F.2d at 959.]

The broad, unlimited legislative declaration that the Postal Service could "be sued" left the Tenth Circuit free to apply doctrines applicable to private persons, including principles of restitution, tort-law, and "contracts implied in law," and thereby to conclude that the equities of that subcontractor were paramount to those of the Postal Service, and that "[i]n like circumstances a private enterprise could not take advantage of the misconduct of its transferor." 508 F.2d at 960.

The foundation of *USF&G*, to the contrary, is that suit here against the United States under 28 U.S.C. § 1491 is not unlimited and does not put the United States on the same plane, in all respects, as if it were a private entity. The controlling axiom is that the United States may be sued only to the extent that it allows its sovereign immunity to be waived. Through 28 U.S.C. § 1491, the United States has consented to be sued for money damages in certain restricted circumstances, the only relevant one being on the basis of a contract (either express or implied-in-fact) between the United States and the claimant.[4] In the absence of a direct contractual link (express or implied in fact), no enforceable contractual right against the United States exists, and therefore a subcontractor, in privity only with its private prime, cannot recover directly from the Government for

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[3] Section 401 granted the Postal Service a number of broad, general powers including the authority "to sue and be sued in its official name," and "to enter into and perform contracts * * *." 39 U.S.C. § 401(1), (3).

[4] It is plain that the Miller Act itself does not mandate compensation by the United States to a subcontractor within the coverage of 28 U.S.C. § 1491 (*cf. United States v. Testan*, 424 U.S. 392 (1976)) and that plaintiff has no claim directly under the Miller Act for relief from this court. Plaintiff makes no contrary contention.

amounts owed it by the prime. *Putnam Mills Corp. v. United States*, 202 Ct. Cl. 1, 8, 479 F.2d 1334, 1337 (1973).[5] This requirement of privity of contract is one important basis for the statement in *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947), that "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation." *Id.* at 241 (citing *H. Herfurth, Jr., Inc. v. United States*, 89 Ct. Cl. 122 (1939)).[6]

The *USF&G* court relied on this *Munsey* language in reaching its conclusion of no standing for subcontractors. In *Munsey* a surety and the United States both asserted a right to contract retainages. The surety had paid off laborers and materialmen and was seeking reimbursement of such payment through subrogation to the rights of the subcontractors against the Government. The Supreme Court said (among other things) that subrogation did not help the surety because the materialmen and laborers had no enforceable rights against the Government and that "one cannot acquire by subrogation what another whose rights he claims did not have." 332 U.S. at 241–42.[7]

We recognized in *USF&G* that there was a possible contradiction between *Munsey* and the later Supreme Court statement in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), on the standing question. In *Pearlman* the contractor defaulted and the surety paid the laborers and materialmen. Both the surety and the contractor's trustee in bankruptcy sought to obtain the contract retainages. *Pearl-*

[5] This court has long followed the general rule that subcontractors (without a contractual arrangement with the Government) cannot themselves sue in this court on their contracts. *See, e.g., H. Herfurth, Jr., Inc. v. United States*, 89 Ct. Cl. 122, 127 (1939) (note 6, *infra*); *Severin v. United States*, 99 Ct. Cl. 435, 442 (1943), *cert. denied*, 322 U.S. 733 (1944).

Moreover, we have no original jurisdiction over tort claims and we have no authority over so-called contracts implied-in-law which are based merely on equitable considerations. *United States v. Minnesota Investment Co.*, 271 U.S. 212, 217 (1926). "The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law." *Merritt v. United States*, 267 U.S. 338, 341 (1925).

[6] We held in *Herfurth* that "[i]t is apparent that the contract was between the defendant and Stetson [the prime contractor], and plaintiff was a subcontractor under a written contract with Stetson. * * * There was no contractual right, expressed or implied, between the plaintiff and the defendant. Plaintiff possessed no privity of contract with the defendant." 89 Ct. Cl. at 127.

[7] The Supreme Court did not have to reach the issue of what claim the subcontractors would have had if both the surety and contractor failed to pay them, and specifically declined to decide that question. 332 U.S. at 242.

man recognized an equitable obligation of the Government to see that laborers and materialmen are paid.[8] It stated that:

> We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; *that the laborers and materialmen had a right to be paid out of the fund;* that the contractor had he completed his job and paid his laborers and materialmen, would have been entitled to the fund; *and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.* [371 U.S. at 141 (emphasis added).]

The tension between *Munsey* and *Pearlman* emerges from the assertion in *Munsey* that "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation," 332 U.S. at 241, and the different *Pearlman* language that "laborers and materialmen had a right to be paid out of the fund," a right which the surety "is entitled to the benefit of * * * to the extent necessary to reimburse it," 371 U.S. at 141. What concerned us in *USF&G* about these two positions is that "[i]t is a short step from *Pearlman* to infer that if the subcontractors have rights to which the surety may be subrogated, then the subcontractors should be able to assert their rights directly * * *." 201 Ct. Cl. at 10, 475 F.2d at 1382. But to allow that would result in a conflict with *Munsey*. *Id.* at 10, 475 F.2d at 1382. *See also, Pearlman, supra*, 371 U.S. at 142 (concurring opinion of Justice Clark).

We reconciled the *Munsey* and *Pearlman* comments when we said that

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[8] In holding for the surety in *Pearlman*, the Court invoked the pre-*Munsey* case of *Henningsen v. United States Fidelity and Guaranty Co.*, 208 U.S. 404 (1908), which held that a surety, which had to pay materialmen on a payment bond as a result of the contractor's default, had rights superior to those of an uninvolved third party (a bank which had loaned money to the contractor, the loan security being assignment of amounts due under the contract), because the surety had

> paid the laborers and materialmen and thus released the contractor from his obligations to them, and to the same extent released the Government from all equitable obligations to see that laborers and supplymen were paid. [208 U.S. at 410.]

With respect to the issue of whether the holding in *Henningsen* had been overruled by *Munsey*, the *Pearlman* Court observed:

> The point at issue in that case [*Munsey*] was whether the United States while holding a fund like the one in this case could offset against the contractor a claim bearing no relationship to the contractor's claim there at issue. We held that the Government could exercise the well-established common law right of debtors to offset claims of their own against their creditors. This is all we held. * * * *Munsey* left the rule in * * * *Henningsen* undisturbed. [371 U.S. at 140-41.]

> the Court in *Pearlman* stated that the surety was entitled to the benefit of *all* the rights of the laborers and materialmen whose claims it paid and those of the contractor whose debts it paid. The surety then is subrogated to the rights of the contractor who could sue the Government since it was in privity of contract with the United States. The surety is likewise subrogated to the rights of the laborers and materialmen who might have superior equitable rights to the retainage but no right to sue the defendant. [*Id.* at 10, 475 F.2d at 1382 (emphasis in original).]

Under this interpretation, *Pearlman* does not conflict with *Munsey* because, while the surety gains equitable rights from its subrogation to the subcontractors' claims, its standing to sue (its ability to *enforce* those rights and others) comes from the fact that it is also subrogated to, and stands in the shoes of, the contractor, an entity which is clearly in privity of contract with the Government. *Id.* at 10, 475 F.2d at 1382. *See Pearlman, supra*, 371 U.S. at 143 (concurring opinion) (alternative suggestion as to surety's position). But the existence of equitable rights in subcontractors (as well as other laborers and materialmen) does not mean that they, too, can sue the United States directly for their part of the retained funds—perhaps unfortunately, Congress has not consented to that class of suit and the subs' right remain unenforceable against the United States under the Tucker Act.

We continue to see our position in *USF&G* as a reasonable reading of the somewhat ambiguous language in *Pearlman*. As *USF&G* pointed out, while the Supreme Court and prior lower court cases dealt with questions of priority to funds held by the Government,

> [n]one have involved a plaintiff-subcontractor directly asserting a claim to money held by the Government. *The subcontractors do possess equitable rights to the retained funds* vis-a-vis other claimants to the money, *but their rights * * * do not necessarily include or imply a right in the subcontractor itself to sue the Government.* [*Id.* at 10–11, 475 F.2d at 1382 (emphasis added).]

See, also, Continental Casualty Co. v. United States, 164 Ct. Cl. 160 (1964), in which we said that "[t]he United States had the right to use the money in its hands to pay laborers and materialmen [citing *Pearlman*], but the laborers and materi-

almen could not force it to do so [citing *Munsey*]." *Id.* at 162–63. This analysis foreshadowed, in capsule form, our views in *USF&G*.

The Tenth Circuit's *Kennedy* opinion questions the *USF&G* reconciliation of the *Munsey* and *Pearlman* statements:

> More importantly the effort in USF&G to reconcile Munsey and Pearlman does not convince us. Munsey says that it does not decide whether subcontractors have any claim to retainage if both contractor and surety fail to pay. Pearlman says that Munsey held only that the Government could exercise its set-off right. Accordingly there is nothing to reconcile. [508 F.2d at 959 (citations omitted).]

The *Kennedy* court may have thought that we saw conflicting *decisions* in the two Supreme Court cases. But that was not the point of our concern; the two *decisions* were obviously reconcilable in result (as *Kennedy* points out). Our focus was, rather, on contrasting statements in the two opinions which do present somewhat of a problem, and our effort was to see if they could be harmonized (the two statements are, after all, in Supreme Court opinions). On that precise topic, *Kennedy* throws no light, nor does it suggest to us either that our reading of the Supreme Court's opinions is incorrect or that the statements in those opinions are truly in conflict.

We add that, even if our understanding in *USF&G* (and in the present opinion) of the Supreme Court's statements is incorrect or unconvincing, that would make no difference in our ultimate conclusion which rests, at bottom, squarely on the limitations on this court's jurisdiction imposed by 28 U.S.C. § 1491. *See* the discussion, *supra*. These restrictions have been recognized and implemented, not only in *USF&G*, but in the cases in this court declaring that subcontractors, without a contractual relationship with the Government, cannot sue either in general or specifically for contract retainages. *See, e.g., Herfurth, supra*, 89 Ct. Cl. at 127; *Continental Casualty, supra*, 164 Ct. Cl. at 162–63; *Putnam Mills, supra*, 202 Ct. Cl. at 8, 479 F.2d at 1337.

It follows that we have no reason to question *USF&G*, and that under it and established principles in this court United has no standing to sue the United States for recovery of its compensation.[9] This is the conclusion mandated, we think, by

[9] In *USF&G* the writer of the present opinion suggested separately, 201 Ct. Cl. at 18, 475 F.2d at 1387, that those subcontractor plaintiffs should be treated as noticed in as

—*Cont.*—

the Tucker Act (as it stands today) but it is not a happy result if United ends up without payment to which it is entitled and for which contract money is available from the Government. As we have done before, we stress that the United States may voluntarily choose to make payment, *see Continental Casualty, supra*, 164 Ct. Cl. at 162–63; *USF&G, supra*, 201 Ct. Cl. at 10, 475 F.2d at 1382, and we believe that it has a non-enforceable obligation to do so, when and if it becomes clear that United had a valid claim, that contract retainages or other unexpended funds under the contract are available for such payment, and that, if those funds are not paid out, the Government will be receiving a windfall which it should not have. *Cf., USF&G, supra*, 201 Ct. Cl. at 12, 475 F.2d at 1383. The Government should not "retain both the benefits of the contract and the funds that were to be used to pay for them." *Id.* at 11, 475 F.2d at 1383.

Defendant's motion to dismiss the petition is granted and the petition is dismissed.

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third-parties under Rule 41(a)(1), and granted recovery in that way. This position was not accepted by the court, and in any event such a solution is not available in the current case. Plaintiff United is the only suing party and there is no other plaintiff to whose presence we could hitch a third-party notice to plaintiff.

Appendix B

§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Wherever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

Aug. 24, 1935, c. 642, § 1, 49 Stat. 793; Nov. 2, 1966, Pub.L. 89-719, Title I, § 105(b), 80 Stat. 1139; as amended Nov. 1,

1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743.

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or con-

ducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub.L. 86-135, § 1, 73 Stat. 279.

Appendix C

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

Nothing herein shall be construed to give the Court of Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

As amended Nov. 1, 1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743.

Appendix D

In the United States Court of Claims
Docket No. 10-80 C

United Electric Corporation, a corporation
Plaintiff,
vs.
United States of America,
Defendant.

[Filed Jan. 7, 1980]

PETITION

To the Honorable United States Court of Claims:

Plaintiff, United Electric Corporation, complains of defendant, United States of America, and alleges as follows:

1. This is a claim for an equitable lien arising from acts of the United States of America ("Defendant"), in connection with a certain construction contract described below.

2. This court has jurisdiction under Section 1491, Title 28, United States Code.

3. Plaintiff, United Electric Corporation ("United"), is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business at St. Paul, Minnesota.

4. On or about August 5, 1977, Defendant, acting by and through its Department of Air Force, awarded Construction Contract No. FO4699-77-90077, Solicitation No. RFP-FO4699-77-09018, to Standard Conveyor Company ("Standard"), a Minnesota corporation. The contract was for the design, fabrication, installation, and testing of a mechanized materials handling system at McClellan Air Force Base in Sacramento, California ("The Project") for the contract price of $4,176,109.

5. On or about April 19, 1978, Standard subcontracted to United a portion of the work required under its contract with Defendant whereby United sold and delivered various electrical components for The Project. United is informed and believes and thereon alleges that said materials were used in the construction of The Project.

6. At the time of the sale and delivery by United to Standard of the said materials, the agreed and reasonable value thereof, which remains unpaid, was and is the sum of $107,958.42; although due demand therefore has been made, no part of said sum has been paid to United, and there is now due, owing and unpaid to United by Standard the sum of $107,958.42, plus interest as allowed by law, for said materials.

7. United performed all conditions on its part to be performed pursuant to its contract with Standard.

8. In or about July, 1979, Standard filed a bankruptcy petition under the Federal Bankruptcy Act. United is informed and believes and thereon alleges that Standard is and will continue to be unable to pay United the debt above alleged.

9. Defendant required from Standard in connection with the Project a payment bond of $494,665.50 only, purportedly pursuant to the provisions of the Miller Act (40 USC, Section 270a) and under the provisions of the contract itself. The proper amount of the payment bond, as required by the Miller Act, was $1,670,444.00.

10. United is informed and believes and thereon alleges that under Standard's contract with defendant, Defendant retains a certain percentage of the contract amount which is in excess of $550,000.

11. On or about February 5, 1979, United made demand upon National Bonding and Accident Ins. Co., Standard's surety under its Miller Act payment bond. Notwithstanding due demand for payment, Standard's surety has failed and refused to pay United, asserting that said bond does not apply to the materials supplied by United to The Project.

12. United alleges that it is entitled to an equitable lien on The Project's contract retentions, and any other funds which should have been but were not retained from Standard by Defendant relating to The Project, for the following reasons:

(a) Defendant, acting by and through its Department of Air Force, negligently failed to require a payment bond based on the total contract for The Project as required by the Miller Act.

(b) Defendant failed to take proper measures to assure that the unpaid balance of the contract price

would be adequate to cover the cost of completion and that Standard had adequate resources to complete its work on The Project.

(c) Defendant knew that Standard was encountering substantial difficulties in performance, yet Defendant failed to obtain full information concerning Standard's progress under the contract, including the status of subcontracts and the financial condition of Standard.

(d) Defendant wrongfully disbursed progress payments to Standard in that they exceeded the percentages of completion by Standard and Defendant failed to determine whether Standard would use the progress payments to pay the costs incurred by Standard in the performance of the contract for The Project.

13. Plaintiff, in asserting the foregoing claim, relies on the contract documents read and construed as a whole, the bond provided by Standard, and on the Miller Act.

14. United is the sole and absolute owner of the claim herein asserted, and has made no transfer of said claim of any part thereof.

WHEREFORE, United demands judgment against The United States of America in the sum of $107,958.42, plus interest as allowed by law, and such other relief as the Court may deem just and appropriate and the nature of the case may require.

Dated: January 2, 1980.

/s/ JOHN F. TAYLOR
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No. 81-132

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-132

UNITED ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a subcontractor on an Air Force contract, contends that the Court of Claims erred in dismissing this action against the United States to recover compensation due under the subcontract after the prime contractor and its surety failed to pay and the government allegedly retained funds owing on the prime contract.

1. According to petitioner's petition in the Court of Claims, in 1977 the Air Force awarded a $4,176,109 contract to Standard Conveyor Company ("Standard") for the design, fabrication, installation, and testing of a mechanized materials handling system at McClellan Air Force Base, California (Pet. App. A-17). In 1978 Standard subcontracted with petitioner to provide electrical components for the project (*ibid.*). Petitioner alleged that it fully performed the subcontract but that Standard, which filed a bankruptcy petition in 1979, failed to pay the subcontract price, $107,958.42 (*ibid.*).

Petitioner further alleged that the government required Standard to post a payment bond of $494,665.50 under the contract pursuant to the Miller Act, 40 U.S.C. 270a, but that the amount of the bond was inadequate (Pet. App. A-18). Although petitioner demanded payment from the surety under the bond, the surety refused payment on the ground that the bond did not cover materials supplied by petitioner (*ibid.*).[1]

Petitioner then brought this action to recover the full subcontract price from the United States, alleging that it had an equitable lien on the sum retained by the government under the prime contract (Pet. App. A-18). Relying on its prior decision in *United States Fidelity & Guaranty Co.* v. *United States*, 475 F. 2d 1377 (1973) (en banc), the Court of Claims dismissed the petition on the ground that petitioner lacks standing because there is no privity of contract between it and the government (Pet. App. A-1 to A-9).

2. The decision of the Court of Claims correctly applies settled law concerning the amenability of the United States to suit for damages. Moreover, the decision below does not conflict with any decision of this Court or of the courts of appeals. Further review is therefore unwarranted.

Petitioner's principal contention (Pet. 3) is that the Court of Claims' ruling conflicts with *Kennedy Electric Co.* v. *United States Postal Service*, 508 F. 2d 954 (10th Cir. 1974). Both the Tenth Circuit (*id.* at 959) and the Court of Claims (Pet. App. A-3 to A-4), however, recognized that the identity of the defendant is crucial in determining whether there is jurisdiction over a subcontractor's action. The defendant in *Kennedy* was the Postal Service, which is an independent establishment specifically authorized by 39 U.S.C. 401(1) to

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[1] Petitioner's suit against the surety was pending in the district court at the time of the decision below (Pet. App. A-2 n.1).

sue and be sued. Thus, sovereign immunity presented no obstacle to suit against the Service, which was found to be just as "amenable to the judicial process as is a private enterprise." *Kennedy Electric Co.* v. *United States Postal Service, supra*, 508 F. 2d at 960, citing *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). The defendant in the present case, in contrast, is the United States. Jurisdiction of this action is therefore governed by the Tucker Act, 28 U.S.C. (& Supp. III) 1491, which provides only a limited waiver of sovereign immunity. As the court below correctly recognized (Pet. App. A-4), while Section 1491 authorizes suits based upon contracts, either express or implied-in-fact, petitioner has no such contract with the government. Accordingly, sovereign immunity mandated dismissal of the present action, a result that is consistent with long-standing precedent in the Court of Claims (see Pet. App. A-5 n.5) and that does not conflict with the Tenth Circuit's decision in *Kennedy*.[2]

Petitioner also contends (Pet. 9-10) that its action is authorized by 28 U.S.C. (& Supp. III) 1491 because it is a claim founded upon an Act of Congress, *i.e.*, the Miller Act, 40 U.S.C. 270a. Petitioner, however, concedes that "the Miller Act does not itself provide for payment of compensation by the United States * * *" (Pet. 9). In light of this concession, the court below correctly held (Pet. App. A-4 n.4) that this action is not founded upon the Miller Act for purposes of Section 1491. See *United States* v. *Testan*, 424 U.S. 392 (1976).

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[2]As the Tenth Circuit noted in *Kennedy* (508 F. 2d at 959):

> *[United States Fidelity & Guaranty Co.* v. *United States]* is a different case from that at bar. We do not have a standing question. Our suit is against an independent establishment having the power to sue and be sued.

Finally, petitioner asserts (Pet. 10-11) that it has a claim under an implied contract theory because when it supplied material to the prime contractor it performed the obligations of the latter to the government, thereby placing itself in the same position as a surety that pays a subcontractor's claim. This contention is basically a claim based on restitution or a contract implied-in-law. As the Court of Claims noted (Pet. App. A-5 n.5), 28 U.S.C. (& Supp. III) 1491 does not waive the government's sovereign immunity from claims based upon a contract implied-in-law. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

DOJ-1981-08